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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR,
Petitioner,

v.

DEFENDERS OF WILDLIFE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF *AMICI CURIAE* AMERICAN ASSOCIATION OF ZOOLOGICAL PARKS & AQUARIUMS AND FRIENDS OF THE EARTH IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*

Amicus curiae, the American Association of Zoological Parks & Aquariums (AAZPA), is a professional association representing virtually every major zoological park, aquarium, wildlife park and oceanarium in North America.[1] The members of AAZPA provide educational pro-

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[1] Both parties have consented to the filing of this brief *amici curiae*. The letters of consent are on file with the Clerk of the Court.

grams, research facilities, and insights into the animal kingdom for the 112 million annual visitors to North America's zoos and aquariums.

AAZPA helps coordinate the conservation and research programs of its members. Its members maintain research facilities throughout the world. The ability of its member organizations to conduct important biological research into endangered species worldwide would be significantly hampered by a restrictive interpretation of the Endangered Species Act. AAZPA has created the Species Survival Plan, a prototype program to protect endangered animals. Forty-nine of fifty-six species in the program have habitats outside of the United States. Several of these species, including the Asian and African elephant, orangutan, and Sumatran rhinoceros, are threatened by projects at issue in the record of this case. Finally, the educational function of zoos and wildlife parks depends on the survival of endangered species throughout the world. More than eighty percent of species exhibited in member institutions have natural habitats outside the United States.

Amicus curiae Friends of the Earth is an organization with 50,000 members and supporters in the United States. Its activities include research, education, litigation and lobbying on a range of international, national and local environmental and wildlife conservation issues. Friends of the Earth is the U.S. affiliate of Friends of the Earth International, a worldwide network with member organizations in forty-three countries. Most of these countries are affected by U.S. agency actions that the courts below held are covered by Section 7 of the Endangered Species Act.

SUMMARY OF ARGUMENT

Section 7 of the Endangered Species Act applies to U.S. agency actions with effects abroad for at least three independent reasons.[2] First, there is nothing "extra-territorial" about applying Section 7 to regulate the internal processes of the United States government. The consultative procedure occurs in this country and is subject solely to the principles of American law. The requirement of "no jeopardy" to endangered or threatened species applies only to U.S. government agency actions; foreign governments are affected only if they voluntarily choose to accept U.S. agency assistance for their projects.

Second, even if this case were deemed to involve the extraterritorial application of U.S. law, the global nature of environmental problems together with the limited burden of Section 7 make inapplicable any presumption that Section 7 should apply only domestically. This Court evaluates each area of law separately before deciding to apply the presumption against extraterritoriality to that area, and the considerations that led the Court to apply that presumption in areas such as labor and employment argue against extending any such presumption to environmental laws such as Section 7.

Third, in any event, the government has functionally conceded that this law applies extraterritorially. The government's own regulation applies Section 7 to the high seas, an area outside the territorial jurisdiction of the United States.

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[2] Section 7(a)(2) provides, in relevant part: "Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species[.]" 16 U.S.C. § 1536(a)(2) (1988).

ARGUMENT

> The wild goose is more of a cosmopolite than we; he breaks his fast in Canada, takes a luncheon in the Ohio, and plumes himself for the night in a southern bayou.
>
> Henry David Thoreau [3]

The extinction of species is one of the greatest environmental threats facing the world community. Many scientists believe that the world is already undergoing one of the largest mass-extinctions in the history of the planet.[4] In 1973, Congress passed the Endangered Species Act, 16 U.S.C. §§ 1531-44 (1988 & Supp. I 1989), to provide a comprehensive U.S. response to this critical problem. A central part of the Endangered Species Act is Section 7, which prescribes that each federal agency shall consult with the Secretary of the Interior to ensure that any action that agency authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered species or threatened species. 16 U.S.C. § 1536 (a) (2).[5] This rule is meant to ensure that extinctions do not occur as the result of actions of the federal government itself.

The two decades since the passage of the Endangered Species Act have demonstrated the wisdom of this aggressive approach to protecting endangered species around the world. In that time, the populations of familiar species

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[3] H. Thoreau, *Walden and "Civil Disobedience"* 212 (Signet Classic, New American Library ed. 1960).

[4] D. Jablonski, *Extinctions: A Paleontological Perspective*, 253 Science 754 (Aug. 16, 1991); *cf.* P. Erlich & E. Wilson, *Biodiversity Studies: Science and Policy*, 253 Science 758 (Aug. 16, 1991).

[5] For actions affecting the high seas, the required consultation is with the Secretary of Commerce. The Secretary of the Interior has delegated land consultations to the Fish and Wildlife Service; the Secretary of Commerce has delegated high-seas consultations to the National Marine Fisheries Service.

such as giant pandas, rhinos and elephants have declined by fifty percent or more.[6] Populations of some migratory songbirds in U.S. states declined by as much as eighty percent in the 1980's alone.[7]

Section 7 of the Endangered Species Act was interpreted from the time of its enactment to apply to all U.S. government actions, in this country or elsewhere, until 1986 when the Interior Department promulgated the regulation at issue here, 50 C.F.R. § 402 (1990). In the case now before the Court, the Secretary urges that the statute does not mean what it clearly says. The Secretary argues that this Court should imply a limited geographic scope into the unambiguous, unlimited language of Section 7. The Secretary urges that Section 7 should apply only to federal agency action carried out wholly within U.S. territorial jurisdiction, and that outside of this country, federal agencies should be free to cause the extinction of entire species of life. This position should be rejected.

I. THE CHALLENGED APPLICATION OF SECTION 7 CANNOT PROPERLY BE CLASSIFIED AS "EXTRATERRITORIAL"

The Secretary rests almost entirely on the argument that applying Section 7 to the agency actions at issue here constitutes an "extraterritorial" application of the Endangered Species Act, and that such an application contradicts principles of statutory interpretation. As a threshold matter, however, the Court need not reach the dispute over the proper theory of statutory construction, because there is nothing "extraterritorial" about regulating the internal activities of the United States government.

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[6] *See, e.g.*, Wu Dunn, *Pessimism Is Growing on Saving Pandas from Extinction*, N.Y. Times, June 11, 1991, at C4, col. 1 (50% decline in giant pandas); Hawkes, *Agony and Ivory*, The Times (London), Aug. 3, 1991 (75% decline in Kenyan elephants).

[7] Schulz, *Outdoors: Migrating Songbirds*, Associated Press, May 13, 1991, Domestic News.

This Court has been reluctant to apply U.S. law where another country could demonstrate that its rights and authority would be infringed. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909).[8] Thus, the Court has sometimes declined to apply U.S. law where it would regulate the activities of persons outside the United States,[9] or governments outside the United States,[10] and where that regulation would conflict with foreign law. The application of Section 7 to federal agency activities to be undertaken in foreign countries does not implicate such a concern. Section 7 does not declare any private action taken in a foreign country to be illegal. It does not prescribe United States environmental standards or regulations for foreign countries. Any foreign country that elects to take action that will threaten its endangered wildlife may do so; it simply must do so without U.S. assistance. The decision by the United States to refrain from spending U.S. funds or to decline to continue a particular U.S. agency program is an issue that can only be judged under U.S. law; there is no potential for conflict with foreign law.

Section 7 of the Endangered Species Act contains two requirements: (1) a procedural requirement that federal agencies consult with one another; and (2) a substantive requirement that agencies not jeopardize endangered wildlife. As the Secretary concedes, the consultations consist

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[8] As discussed below, the holding of *American Banana*—that the U.S. antitrust laws do not apply to conduct outside of the U.S.—has since been overruled. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 704-05 (1962).

[9] *See EEOC v. Arabian American Oil Co.*, 111 S. Ct. 1227 (1991) (*"Aramco"*). Indeed, this Court has sometimes applied this rationale so as not to apply U.S. law to disputes between purely foreign parties while in U.S. territory. *See McCulloch v. Sociedad Nacional de Marineros*, 372 U.S. 10 (1963) (labor dispute between foreign sailors and foreign vessel owners in U.S. port); *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957) (same).

[10] *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *Underhill* v. *Hernandez*, 168 U.S. 250 (1897).

of "structured deliberations—which are *wholly internal* to the United States Government[.]" [11] This consultation occurs entirely within the juridical confines of the United States and is subject only to the requirements of domestic law. The consultations take place physically within a few blocks of this Court. The adequacy of the Section 7 consultation can be judged only by domestic law. No foreign law could apply.

The substantive "no jeopardy" requirement of Section 7 applies only to the actions of the U.S. government.[12] Domestically, this requirement may in some circumstances prevent a project from going forward at all. Applied abroad, the question primarily is whether the United States will subsidize another nation's projects.[13] As this Court held last term, it is Congress' right to decide which projects are subsidized with U.S. money. *Rust v. Sullivan*, 111 S. Ct. 1759, 1775 (1991). "[T]o avoid the force of the regulations, [the recipient] can simply decline the subsidy." *Id.* at 1775 n.5. Similar conditions on federal aid to states have never been held to infringe state sovereignty.[14]

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[11] Brief for Petitioner Manuel Lujan, Jr., Secretary of the Interior at 32 (filed July 12, 1991) (hereinafter "Br.") (emphasis added).

[12] The Solicitor of the Interior Department, in his interpretation of Section 7 most nearly contemporaneous with passage of the Act, rejected the argument that the section would infringe foreign sovereignty on exactly this basis: "It should be remembered that the jeopardy clause actually applies only to U.S. agencies[.]" J.A. at 185.

[13] From time to time, U.S. agencies may undertake unassisted projects abroad (e.g. Voice of America radio towers). But again, the decision to modify or forgo such a project so as not to jeopardize endangered species is not "extraterritorial"; the decision concerns only how U.S. agencies spend U.S. money. The possibility of conflict with other governments is even less than in the more typical case where the United States is assisting a foreign government's project.

[14] *See, e.g., South Dakota v. Dole*, 483 U.S. 203 (1987) (upholding minimum drinking age/receipt of highway funds tie);

The Secretary claims, without any record support, that the "no jeopardy" requirement may sometimes affront foreign sensibilities. Br. at 46-47. This is very different from an argument that Section 7 conflicts with foreign rights, and is not enough to make the application of Section 7 "extraterritorial." In fact, the political branches frequently attach restrictions on the use of U.S. foreign aid funds.[15] As the government itself concedes, recipients of funds from the U.S. Agency for International Development must agree to environmental conditions complementary to those in Section 7 of the Endangered Species Act.[16] Among many other conditions, foreign aid recipients must typically agree not to violate U.S. notions of what constitutes bribery, and must comply with U.S. legislation forbidding the boycott of Israel.[17] There is nothing unprecedented or even unusual about interpreting Section 7 in a way that affects projects assisting foreign governments.

In sum, Section 7 is merely one of many laws that impose substantive and procedural restrictions on federal

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Nevada v. Skinner, 884 F.2d 445 (9th Cir. 1989) (upholding speed limit/highway funds tie), *cert. denied*, 110 S. Ct. 1112 (1990).

[15] *See, e.g.*, 22 U.S.C. § 2151b(f)(1) (1988) (conditioning any contribution to the United Nations' Population Fund on assurances that the Fund not engage or assist in abortion); Pub. L. No. 101-513, 1990 U.S. Code Cong. & Admin. News, *to be printed at* 104 Stat. 1979, 2016 (applying same restrictions on all foreign assistance funds).

[16] *See* 22 U.S.C. § 2151q(g) (1988) (directing Administrator of AID to take various actions to protect endangered species); *cf.* 22 U.S.C. § 262m-2, -4, -5, -7 (1988 & Supp. I 1989) (U.S. to vote shares in World Bank and similar bodies with consideration of environmental concerns); Pub. L. No. 101-513, 104 Stat. at 2013-16 (imposing environmental restrictions on all foreign aid funds).

[17] *See, e.g.*, 22 U.S.C. § 2779(c) (1988) (bribery); 50 U.S.C. App. § 2402(5)(a) (1988) (Israeli boycott); Pub. L. 101-513, 104 Stat. at 1982 (same).

government decisions. If the Secretary's position were correct, none of these laws that assure regularity in the practice of government—the Administrative Procedure Act, the Merit Systems Protection Act, the Government in the Sunshine Act, the Ethics in Government Act, or the Freedom of Information Act, to name a few—would apply whenever the specific decision at issue has an impact in a foreign nation.[18] The Secretary has cited no case, in this Court or in any other, in which rules structuring government decisions have been deemed an "extraterritorial" application of law.[19] While Section 7 may sometimes have an international component, its requirements are intrinsically domestic and a direct incident of American sovereignty. This procedure cannot properly be deemed extraterritorial.

II. THE ENDANGERED SPECIES ACT WAS ENACTED AGAINST THE BACKGROUND OF INTERNATIONAL CHOICE-OF-LAW PRINCIPLES THAT EXTEND THE ACT TO U.S. ACTIONS AFFECTING SPECIES OUTSIDE THE UNITED STATES

Even if requiring compliance with Section 7 for projects abroad were deemed an extraterritorial application of the Act, the Secretary's contention—that such an ap-

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[18] None of these statutes specifically states that it applies to decisions having some impact in foreign states, although of course none is specifically limited to actions with purely domestic effect.

[19] The Secretary's reliance on *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056 (1990), Br. at 33, 45, is disingenuous. There, the Court held that the Fourth Amendment, which extends to "the people," does not protect foreign citizens outside of the United States, 110 S. Ct. at 1065; the Court did not hold that the Fourth Amendment never applies outside this country. *Cf. Reid v. Covert*, 354 U.S. 1 (1957) (Fourth and Fifth Amendment constraints do apply to military trial of U.S. citizens abroad). *Foley Bros., Inc. v. Filardo*, 336 U.S. 281 (1949), involved the failure of a private employer (a government contractor) to provide overtime pay for work done in two foreign countries, and does not address statutory constraints on the government itself.

plication is presumptively impermissible—cannot be sustained.

A. The Judicially-Created Presumption Against Extraterritoriality Is Merely an Aid to Statutory Construction

The presumption against extraterritoriality upon which the Secretary relies is purely a judicial creation. Such presumptions have vitality only to the extent that they produce an accurate reflection of the intent of Congress.[20] This Court has long recognized that presumptions and other principles of statutory construction are not rules of law, but are instead common-sense guides to ascertain what the political branches likely intended: [21]

> Generalities about statutory construction help us little. They are not rules of law but merely axioms of experience. They do not solve the special difficulties in construing a particular statute. The variables render every problem of statutory construction unique.[22]

In each new area of law, the Court has always considered whether and to what extent the presumption against extraterritoriality reflects the will of the political branches.[23] As discussed below, in the context of environ-

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[20] *United States v. Albertini*, 472 U.S. 675, 680 (1985) ("Any other conclusion, while purporting to be an exercise in judicial restraint, would trench upon the legislative powers vested in Congress by Art. I, § 1, of the Constitution").

[21] *See Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 672 n.3 (1986) (a presumption is controlling only "where substantial doubt about the congressional intent exists").

[22] *Weinberger v. Rossi*, 456 U.S. 25, 28 (1982) (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221 (1952)).

[23] As this Court has said about a related principle of statutory construction: "this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 493 n.11 (1985) (quoting *United States v. Albertini*, 472 U.S. 675, 680 (1985)).

mental regulation, a presumption in favor of extraterritorial application is more plausible than the presumption urged by the Secretary.

B. Any Presumption Against Extraterritoriality Does Not Apply to Environmental Laws in General or to the Endangered Species Act in Particular

Environmental menaces pose unique threats to the international community. Events in one nation may have profound consequences for neighboring--or even distant --countries.[24] The Kuwaiti oil fires[25] and the Chernobyl nuclear reactor explosion[26] are just two recent examples of the impossibility of countries' sealing their borders from environmental disasters occurring abroad.

The worldwide depletion of the ozone layer may lead to millions of new cases of skin cancer in the United States alone.[27] Acid rain from the United States has "killed" more than 17,000 bodies of water in Canada and may have eliminated a variety of fish from these lakes and rivers.[28] Global warming may transform entire ecosys-

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[24] As discussed below, the fact that an action overseas has effects in the United States is an accepted basis under international law for U.S. legislation to regulate that action. *See* Restatement (Third) Foreign Relations Law of the United States § 402(1)(C) (1986); *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

[25] *See, e.g., Oil "May Have Killed 20,000 Birds"*, Press Ass'n Ltd., Mar. 28, 1991; Hiltzik, *Sifting Through the Wreckage of a Shattered Ecosystem*, L.A. Times, Mar. 5, 1991, at 3, col. 1.

[26] *See Fears Over Radiation Spreading in Europe*, Chicago Tribune, May 3, 1986, at 5; *Japan Finds Higher Radiation in Rain*, L.A. Times, May 5, 1986, pt. 1, at 6, col. 2.

[27] EPA Proposed Rule on Protection of Stratospheric Ozone, 52 *Fed. Reg.* 47,489 (1987) (to be codified at 40 C.F.R. pt. 82) (proposed Dec. 14, 1987). The ozone layer acts as a shield to harmful ultraviolet radiation, and the direct effects of worldwide ozone depletion on Americans are enormous. *Id.*

[28] *See, e.g.*, Clairborne, *Rare Trout Reintroduced to Dead Lake*, Wash. Post, June 5, 1990, at A21; Gallob, *Birth of the North*

tems and lead to fundamental changes in fisheries and local climates.[29] Extinctions caused by the eradication of the tropical and subtropical rain forests may preclude scientists from producing drugs that have proven effective in treating cancer, malaria, eye diseases, and other ailments.[30] The loss of other plant species endangers agronomists' efforts to produce higher-yielding and disease-resistant varieties of crops such as corn, rice, and wheat.[31]

The protection of endangered species is a closely related concern that also transcends national boundaries. Endangered species migrate freely across long distances, with no respect for national boundaries. Many of the animals on the endangered species list issued by the Secretary live, at different times, in both the United States and foreign countries. Species such as the gray whale, whooping crane, and peregrine falcon all regularly migrate between the United States or its waters and foreign countries or their waters.[32] The global nature of environ-

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American Trans-boundary Environmental Plaintiff, 15 Harv. Envtl. L. Rev. 85 (1991). Similarly, acid rain from pollution sources in Mexico may affect lakes, rivers and other habitats in the U.S. *See Acid Rain in the West*, N.Y. Times, Oct. 7, 1986, at C3, col. 5.

[29] The theory of global warming is that the recent rapid increase in the amount of carbon dioxide in the earth's atmosphere (a total increase of at least 25% has already taken place) will change our planet's equilibrium temperature. If current technological and economic trends continue, it is considered "all but certain" that noticeable global warming will occur. *See* Rathjens, "Energy and Climate Change," in *Preserving the Global Environment* 154, 167, 184 (J. Mathews ed. 1991).

[30] *See Drug Store News*, Vol. 13, No. 9, at 64 (1991).

[31] P. Erlich & E. Wilson, *Biodiversity Studies: Science and Policy*, 253 Science 758, 760 (Aug. 16, 1991).

[32] Moreover, non-migratory endangered species such as the Everglades kite, American crocodile, and West Indian manatee are found both in the United States and in other countries. Federal agency actions that reduce the range of such species outside the United

mental problems means that the Court cannot presume that when the political branches legislate on environmental issues, they retain a parochial domestic focus.

Moreover, the political branches acted against the backdrop of a long history of involvement in global environmental issues when they passed the Endangered Species Act. The United States has demonstrated its concern about global environmental problems—especially concerning wildlife—in a series of international agreements. The Endangered Species Act itself was enacted to implement one of the major international wildlife treaties, the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES").[33] The treaty commits its signatories to protect endangered species throughout the world.

The Endangered Species Act identifies a variety of treaties besides CITES in which the United States has pledged to conserve endangered species. 16 U.S.C. § 1531 (a)(4). The Act states that one of its primary purposes was the achievement of the goals of those treaties and conventions. These treaties, dating back to 1916, obligate the United States to preserve and protect migratory birds through the regulation of hunting, the establishment of refuges, and the protection of bird habitats. The United States has also signed bird protection treaties with neighbors including Canada, Mexico, Japan, and the Soviet Union.[34] In another series of international conventions,

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States mean that the burden of preventing the extinction of those species will fall disproportionately on this country.

[33] *Done* March 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249, 993 U.N.T.S. 243, *amended* June 22, 1979, see U.S. Dep't of State, *Treaties in Force* 295 (1990).

[34] *See* Convention for the protection of Migratory Birds, Aug. 16, 1916, United States-Great Britain, 39 Stat. 1702, T.S. No. 628; Convention for the Protection of Migratory Birds and Game Mam-

the United States has pledged to protect fish and other living resources on the high seas.[35] These conventions protect the harvest of salmon and tuna, and limit the capture of whales.

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mals, Feb. 7, 1936, United States-Mexico, 50 Stat. 1311, T.S. No. 912; Convention for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, Mar. 4, 1972, United States-Japan, 25 U.S.T. 3331, T.I.A.S. No. 7990; Convention Concerning the Conservation of Migratory Birds and Their Environment, Nov. 19, 1976, United States-USSR, 29 U.S.T. 4647, T.I.A.S. No. 9073.

In the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, *opened for signature* Oct. 12, 1940, 56 Stat. 1354, 1356, T.S. No. 981, 161 U.N.T.S. 193, 194, the governments of North and South America (including the United States) have agreed to "protect and preserve in their natural habitat representatives of all species and genera of their native flora and fauna, including migratory birds, in sufficient numbers and over areas extensive enough to assure them from becoming extinct through any agency within man's control[.]"

[35] America's international commitments in this area include the following: Convention on Fishing and Conservation of the Living Resources of the High Seas, *done* Apr. 29, 1958, 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285; Amended Agreement for the Establishment of the Indo-Pacific Fisheries Council, *approved* Nov. 23, 1961, 13 U.S.T. 2511, T.I.A.S. No. 5218, 418 U.N.T.S. 348; Convention for the Establishment of an Inter-American Tropical Tuna Commission, May 31, 1949, 1 U.S.T. 230, T.I.A.S. No. 2044, 80 U.N.T.S. 3; Convention for the High Seas Fisheries of the North Pacific Ocean, May 9, 1952, 4 U.S.T. 380, T.I.A.S. No. 2786, 205 U.N.T.S. 65; Memorandum of Understanding Concerning Salmonid Research and Enforcement of the International Convention for the High Seas Fisheries of the North Pacific Ocean, Apr. 9, 1986, *see* U.S. Dep't of State, *Treaties in Force* 319 (1990); Convention for the Conservation of Atlantic Tunas, *done* May 14, 1966, 20 U.S.T. 2887, T.I.A.S. No. 6767, 673 U.N.T.S. 63; Convention for the Conservation of Salmon in the North Atlantic Ocean, *opened for signature* Oct. 1, 1983, T.I.A.S. No. 10789; and, Treaty on Fisheries, Apr. 2, 1987, *see* U.S. Dep't of State, *Treatigs in Force* 319 (1990).

The treaties governing the protection of wildlife are only one part of the United States' concern about global environmental problems. The 1909 Boundary Waters Treaty, aimed at water pollution, was one of the earliest bilateral efforts at international environmental cooperation.[36] In 1979, the U.S. recognized the international problem of acid rain by becoming one of thirty-five signatories to the Convention on Long-Range Transboundary Air Pollution.[37] Similarly, the United States and other countries acted on a global scale to address the problem of ozone depletion.[38] In 1988, representatives from thirty countries, including the U.S., agreed to begin drafting a global warming treaty, which is hoped to be completed in

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[36] Treaty Relating to Boundary Waters, Jan. 11, 1909, United States-Great Britain, 36 Stat. 2448, T.S. No. 548. Subsequent agreements include the Agreement on Great Lakes Water Quality, Apr. 15, 1972, United States-Canada, 23 U.S.T. 301, T.I.A.S. No. 7312; Agreement on Great Lakes Water Quality, Nov. 22, 1978, United States-Canada, 30 U.S.T. 1383, T.I.A.S. No. 9257; and the Agreement Amending the Agreement on Great Lakes Water Quality, Oct. 16, 1983, United States-Canada, T.I.A.S. No. 10798.

[37] *Done* Nov. 13, 1979, 34 U.S.T. 3043, T.I.A.S. No. 10541. The Convention committed its signatories to reduce air pollution emissions, stimulate national pollution reduction efforts, increase cooperation and consideration among countries, and create a framework for addressing international environmental issues. The United States has adopted two protocols to the Convention: the Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution, *done* Sept. 24, 1984, 27 I.L.M. 698, and the Protocol Concerning the Control of Emissions of Nitrogen Oxides or Their Transboundary Fluxes, Nov. 1, 1988, 28 I.L.M. 212. In addition, the United States has signed a separate agreement with Canada on air pollution: Memorandum of Intent Concerning Transboundary Air Pollution, Aug. 5, 1980, United States-Canada, 32 U.S.T. 2521, T.I.A.S. No. 9856.

[38] The Protocol on Substances that Depiete the Ozone Layer, *opened for signature* Sept. 16, 1987, 26 I.L.M. 1541. The Protocol supplements the Vienna Convention for the Protection of the Ozone Layer, *opened for signature* March 22, 1985, 26 I.L.M. 1516.

time for consideration at the 1992 United Nations Conference on Environment and Development in Brazil.[39]

Given this long history of international treaties on environmental matters—all ratified by Congress, and many specifically referenced in the Endangered Species Act itself—it simply does not make sense to presume that the political branches of government are concerned only about domestic matters when they consider environmental legislation. As discussed above, this conclusion is reinforced by the inherently global nature of environmental issues. Moreover, given the pervasive international focus of the Endangered Species Act itself,[40] the Court can and should presume that all sections of the Act apply extraterritorially unless they specifically state otherwise.[41]

C. This Court Has Evaluated Each Area of Law Separately Before Deciding to Presume that U.S. Laws in that Area Apply Only Within U.S. Territory

The Secretary relies on cases holding, in some areas of law, that there is a presumption that U.S. statutes are

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[39] *See* Chayes, "Managing the Transition to a Global Warming Regime or What to Do til the Treaty Comes," in *Greenhouse Warming: Negotiating a Global Regime* 61 (World Resources Institute ed. 1991).

[40] *See* Note, *The International Applicability of Section 7 of the Endangered Species Act of 1973*, 29 Santa Clara L. Rev. 171 (1989) (concluding that § 7 should have extraterritorial application); *see generally* G. Born & D. Westin, *International Civil Litigation In United States Courts* ch. 7B (1989).

[41] Section 9(a)(1)(B) of the Endangered Species Act in fact limits the prohibition on when one may "take" endangered or threatened species to takings within the United States or its territorial sea; Section 9(a)(1)(C) imposes a similar prohibition on high seas takings. 16 U.S.C. § 1538(a)(1)(B)-(C). This suggests that when the Act means to limit itself to domestic or high seas applications, it says so specifically. Where, as in Section 7, no such limitation appears, the Act is meant to apply without geographic limitation.

not intended to apply abroad.[42] At one time the presumption applied broadly in U.S. law,[43] but it has been significantly narrowed in more recent cases. To decline to apply this presumption to the federal environmental laws generally or to the Endangered Species Act in particular would be consistent with precedent in numerous areas of law.

Many areas of U.S. law illustrate the facts that: (1) the political branches have concerned themselves with conduct abroad, and (2) the U.S. courts have made an area-by-area determination whether a presumption against extraterritoriality is appropriate. For instance in the area of antitrust, this Court overruled its holding in *American Banana*, and has applied U.S. laws extraterritorially to encompass a wide range of conduct occurring solely or mostly in foreign jurisdictions. *See Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 705 (1962); *United States v. Sisal Sales Corp.*, 274 U.S. 268, 275-76 (1927).[44]

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[42] *See Aramco*, 111 S. Ct. 1227 (presumption applies in employment discrimination case); *Foley Bros.*, 336 U.S. 281 (same, in labor case). *But see, e.g., Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962) (declining to apply presumption in antitrust case).

[43] *See, e.g.*, J. Story, *Commentaries on the Conflict of Laws* § 539 (7th ed. 1872); H. Wheaton, *Elements of International Law* §§ 77, 111-14, 134-51 (1866).

[44] This Court recently characterized *American Banana* as having been "substantially overruled" by *Continental Ore. W.S. Kirkpatrick v. Environmental Tectonics Corp.*, 110 S. Ct. 701, 705 (1990). Likewise, this Court has repeatedly cited with approval the Second Circuit's decision in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), holding that the Sherman Act applies to conduct abroad that has effects within the United States. *See Continental Ore Co. v. Union Carbide*, 370 U.S. 690, 704-05 (1962); *Steele v. Bulova Watch Co.*, 344 U.S. 280, 288 n.16 (1952); *Zenith Radio Corp. v. Hazeltine Research Corp.*, 395 U.S. 100, 114 n.8 (1969). *Accord* Restatement (Third) Foreign Relations Law § 415; U.S. Dep't of Justice, *Antitrust Enforcement Guidelines for International Operations* 29-34 (1988).

The federal courts have applied domestic law extraterritorially in many other instances where the governing statutes speak in jurisdictional terms much less specific than the Endangered Species Act.[45] For instance, this Court interpreted the Jones Act to apply extraterritorially in *Lauritzen v. Larsen*, 345 U.S. 571, 576-77 (1953), where the United States has the predominant interest in the acts at issue.[46] The Lanham Act is worded broadly and makes no specific reference to conduct occurring abroad. Nonetheless, this Court held in *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952), that the Lanham Act applies extraterritorially to prevent trademark infringement abroad that has effects in this country. Similarly, U.S. patent law has been held to apply extraterritorially to prevent infringing effects in the United States,[47] as has U.S. copyright law,[48] though neither statute contains an explicit declaration to that effect.

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[45] By contrast, Endangered Species Act § 3(9) contains one of the broadest definitions of "foreign commerce" covered by the Act anywhere in federal law: "The term 'foreign commerce' includes, among other things, any transaction—(A) between persons within one foreign country; (B) between persons in two or more foreign countries; (C) between a person within the United States and a person in a foreign country; or (D) between persons within the United States, where the fish and wildlife in question are moving in any country or countries outside the United States." 16 U.S.C. § 1532(9).

[46] Using the balancing formula set forth in the decision, the *Lauritzen* Court declined to exercise jurisdiction over the particular transaction at issue. 345 U.S. at 583-93. However, in another case this Court found that the same factors weighed in favor of the extraterritorial exercise of Jones Act jurisdiction. *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306 (1970).

[47] *See Spindelfabrik Suessen-Schurr v. Schubert & Salzer Maschinfabrik Aktiengesellschaft*, 903 F.2d 1568, 1577 (Fed. Cir. 1990) (sustaining injunction requiring foreign defendant to label all machines sold anywhere in the world as: "Not available for sale, use or delivery to the United States").

[48] *See Update Art, Inc. v. Modiin Pub., Ltd.*, 843 F.2d 67 (2d Cir. 1988); *Peter Starr Prod. Co. v. Twin Continental Films, Inc.*, 783 F.2d 1440 (9th Cir. 1986).

The federal securities laws are couched in general terms that do not specifically refer to conduct occurring in foreign states. But it is well-established that the securities laws are applicable extraterritorially to foreign conduct.[49] Like the securities laws, the U.S. commodities laws have routinely been held to apply extraterritorially.[50]

The courts have held that generally worded federal narcotics and other criminal statutes apply outside the United States.[51] The United States exercises extraterri-

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[49] *See* Restatement (Third) Foreign Relations Law § 416, comment a; *SEC v. Tome*, 833 F.2d 1086, 1087-88 (2d Cir. 1987), *cert. denied*, 486 U.S. 1014 (1988); *SEC v. Certain Unknown Purchasers*, 817 F.2d 1018 (2d Cir. 1987), *cert. denied*, 484 U.S. 1060 (1988); *SEC v. Vaskevitch*, 657 F. Supp. 312 (S.D.N.Y. 1987); *SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. 111 (S.D.N.Y. 1981); *see also SEC v. Minas de Artemisa, S.A.*, 150 F.2d 215 (9th Cir. 1945).

Dozens of lower court decisions have applied the securities laws extraterritorially in private actions. *See, e.g., Grunenthal GmbH v. Hotz*, 712 F.2d 421, 425 (9th Cir. 1983); *Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d 409 (8th Cir. 1979); *Schoenbaum v. Firstbrook*, 405 F.2d 215 (2d Cir. 1968) (en banc), *cert. denied*, 395 U.S. 906 (1969); *cf. Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 30-31 (D.C. Cir. 1987).

[50] *See, e.g., Tamari v. Bache & Co. (Lebanon) S.A.L.*, 730 F.2d 1103 (7th Cir.), *cert. denied*, 469 U.S. 871 (1984); *Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041 (2d Cir. 1983); *Transnor (Bermuda) Ltd. v. B.P. North America Petroleum*, 738 F. Supp. 1472 (S.D.N.Y. 1990).

[51] *E.g., Kawakita v. United States* 343 U.S. 717 (1952); *United States v. Bowman*, 260 U.S. 94 (1922); *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820); *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991); *United States v. Wright-Barker*, 784 F.2d 161 (3d Cir. 1986); *United States v. Baker*, 609 F.2d 134 (5th Cir. 1980); *United States v. Brown*, 549 F.2d 954 (4th Cir.), *cert. denied*, 430 U.S. 949 (1977); *cf. Blackmer v. United States*, 284 U.S. 421 (1932) (sustaining extraterritorial subpoena to require U.S. citizen to appear at criminal trial).

torial jurisdiction to impose taxes.[52] To adopt the government's position in this case—that no U.S. statute on any subject applies extraterritorially unless it contains a specific statement to that effect—would endanger important federal civil and criminal enforcement efforts in numerous areas.[53]

The Secretary—while barely acknowledging the broad range of laws applying extraterritorially, Br. at 33 n.21—infers a rigid presumption from a line of cases beginning with *Foley*, and ending with this Court's decision in *Aramco*, 111 S. Ct. 1227.[54] Each of these cases applies a presumption against extraterritoriality in the context of statutes regulating labor and employment.[55] However,

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[52] Restatement (Third) Foreign Relations Law §§ 411-12; *Cook v. Tait*, 265 U.S. 47 (1924).

[53] Indeed, just last term in the *Aramco* case the government took the position that the presumption of territoriality was substantially more limited than the position it urges here. *See* Brief for the EEOC at 8-10.

[54] The other two cases in that line of authority, *McCulloch v. Sociedad Nacional de Marineros*, 372 U.S. 10 (1963), and *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957), provide the government little support. Although both cases discuss the presumption against extraterritoriality, both involve disputes between foreign seamen and their foreign employer while docked at a *United States* port. The ultimate rationale for decision in both cases was legislative history of the statutes at issue declaring that the statutes were meant to protect "American workingmen" rather than aliens. *McCulloch*, 372 U.S. at 20; *Benz*, 353 U.S. at 144. Because they involve actions in the United States, neither case is properly understood as raising extraterritoriality issues. Rather, each is a case where the Court declined to exercise jurisdiction where it undoubtedly could have done so, out of concern for comity with other nations that had a greater interest in the disputes at issue.

[55] *Foley* involved the "Eight-Hour Law"; *Aramco* involved the employment discrimination provisions in Title VII of the 1964 Civil Rights Act; *McCulloch* and *Benz* involved the National Labor Relations Act.

labor and employment are traditionally local concerns, and have rarely been the subject of extraterritorial legislation by any country. To seek to regulate workplace conditions and the duties of employers in another country would present a serious danger of conflict with that country's laws.[56] The Restatement (Third) Foreign Relations Law of the United States (1986) generally does not recognize a presumption against extraterritoriality.[57] But the Restatement does conclude that U.S. extraterritorial jurisdiction is limited "over predominantly local activities, such as industrial and labor relations[.]" *Id.* at § 414 comment c.

Aramco, an employment law case on which the government places the greatest weight, is inapposite. In *Aramco*, the statute at issue defined the "commerce" covered by the

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[56] Section 7 presents a much less significant risk of conflicts, because it only regulates the activities of the U.S. government and has effect in foreign countries only if they choose to accept U.S. aid. By contrast, in many of the areas discussed above such as antitrust or securities law in which U.S. law is applied extraterritorially, U.S. law declares illegal acts done by private parties in foreign countries, even though those acts may be permissible under the home countries' laws.

[57] The Restatement (Third) discussed its decision to omit a presumption that U.S. statutes apply only domestically:

> In the past, the jurisdiction of a state to make its law applicable in a transnational context was determined by formal criteria supposedly derived from concepts of state sovereignty and power. . . . Increasingly, the practice of states has reflected conceptions better adapted to the complexities of contemporary international intercourse. . . . Territoriality and nationality remain the principal bases of jurisdiction to prescribe, but in determining their meaning rigid concepts have been replaced by broader criteria[.]

Id. at 235-37. Among other permissible bases of jurisdiction, Restatement § 402(2) allows the United States to regulate the conduct of its nationals, and Restatement § 402(1)(C) allows the United States to regulate based on effects within this country of activity abroad.

act with boilerplate language borrowed from statutes never held to apply extraterritorially.[58] Here, Endangered Species Act Section 3(9) carefully defines "foreign commerce" in a way that leaves no doubt as to its extraterritorial effect.[59] The statute in *Aramco* had numerous procedural indications that it was intended to apply only in the United States.[60] Here, several provisions of Endangered Species Act Section 7 indicate that the political branches anticipated and squarely addressed its application outside this country.[61]

The presumption against extraterritorality applied in the *Foley-Aramco* line of cases is appropriate in the field of labor and employment. In contrast, as demonstrated above, that presumption is not appropriate in the environmental area. In environmental cases, the Court should assume (as it does in many other areas) that the political branches legislate against the background of choice-of-law and public international law principles. Those principles allow the United States to regulate its own nationals and to regulate activities abroad with an effect in this country. Where (unlike here) there is an actual conflict with the laws of another sovereign with a greater interest in the

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[58] 111 S. Ct. at 1231-32.

[59] *See* n.45 *supra*.

[60] 111 S. Ct. at 1234.

[61] *See, e.g.*, § 7(n) (granting judicial review for agency actions "outside of any circuit," and granting standing to seek judicial review to any "person," defined in § 3(13) to include foreign governments); § 7(i) (State Department consultation on exemptions affecting treaty obligations); § 7(j) (granting exemptions where necessary for national security).

As discussed below, another distinction between *Aramco* and this case is that in *Aramco*, the agency charged with enforcing the statute originally interpreted it to apply only domestically, 111 S. Ct. at 1235, while the contemporaneous interpretation of Section 7 by the agencies charged with enforcing it held that Section 7 does apply to agency action outside the United States.

transaction, U.S. courts may decline to exercise jurisdiction under a comity analysis.[62] Interpreted against this background, the Court should not presume that U.S. environmental laws apply only domestically.

The Secretary argues, citing *Aramco*, Br. at 33, that respondents must demonstrate a "clear statement" that Section 7 applies outside the United States. The Secretary concedes, Br. at 39-41, that parts of the Endangered Species Act do apply extraterritorially, and the Secretary cites no authority for requiring a "clear statement" in every section of an act that concededly applies extraterritorially at least in part. We respectfully suggest that the "clear statement" hurdle need only be crossed for the Act as a whole. In any event, the use of the terms "endangered species" and "threatened species" in Section 7—terms that concededly apply extraterritorially[63]—establishes the requisite clear statement that the section apply overseas.[64]

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[62] *See* Restatement (Third) § 403; *Timberlane Lumber Co. v. Bank of American N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976), *aff'd after remand*, 749 F.2d 1378 (9th Cir. 1984), *cert. denied*, 472 U.S. 1032 (1985). This comity approach avoids serious conflicts with foreign law where they actually occur, but allows the United States to vindicate important interests abroad when no conflict exists, or when the U.S. interest outweighs the foreign interest. Such a "particularized analysis of the respective interests of the foreign nation and the requesting nation" was exactly the method this Court recently set forth for determining when to allow direct extraterritorial discovery under the Federal Rules of Civil Procedure. *Societe Nationale Industrielle Aerospatiale v. U.S. District Court*, 482 U.S. 522, 543-44 (1987).

[63] Indeed, of the 1137 species listed under the Act on May 31, 1991, 522 are found exclusively outside this country. U.S. Fish and Wildlife Service, Endangered Species Technical Bulletin, vol. XVI, No. 6, June 1991 at 12.

[64] *See also supra* n.61 (listing procedural indications that Section 7 applies abroad).

III. THE SECRETARY'S OWN REGULATION ALREADY RECOGNIZES THAT SECTION 7 APPLIES TO U.S. AGENCY ACTIONS OUTSIDE THIS COUNTRY'S TERRITORIAL JURISDICTION

Even if a presumption against extraterritoriality were applied to this case, the Secretary, by virtue of his own regulations, concedes that Section 7 is properly interpreted to apply outside the territory of the United States. The regulation that the Secretary defends here applies, by its own terms, outside the territory of the United States, to the global commons of the high seas.[65]

The high seas, by definiton, are outside the "territorial" limits of any nation.[66] This Court has consistently held that an application of federal statutes to actions occurring on the high seas is an extraterritorial application of U.S. law. *See, e.g., Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440 (1989); *Aramco*, 111 S. Ct. at 1235 (treating statutes applying to the high

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[65] Both before and after the 1986 changes to the regulation at issue here, the regulation has applied to agency action affecting the high seas. *Compare* 50 C.F.R. § 402.01(a) (1987) ("Section 7(a)(2) of the Act requires every Federal agency, in consultation with . . . the Secretary, to insure that any action it authorizes, funds, or carries out, *in the United States or upon the high seas*, is not likely to jeopardize the continued existence of any listed species") (emphasis added) *with* 50 C.F.R. § 402.01(a) (1978) ("Section 7(a)(2) requires every Federal agency to insure that its activities or programs, *in the United States, upon the high seas, and in the foreign countries* will not jeopardize the continued existence of listed species") (emphasis added).

[66] *United States v. Louisiana*, 394 U.S. 11, 23 (1969); *United States v. Romero-Galue*, 757 F.2d 1147, 1149 n.1 (11th Cir. 1985). *Accord* Convention on the High Seas, art. 1, *done* Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82; United Nations Convention on the Law of the Sea, pt. VII, § 1, art. 86, *opened for signature* Dec. 10, 1982, 21 I.L.M. 1261 (the latter has not yet entered into force).

seas as extraterritorial).[67] In concluding that Section 7 applies extraterritorially to the high seas, the Secretary necessarily discerns that the section contains the requisite indication of extraterritorial intent.[68]

At the very least, the inconsistency of the regulations and the Secretary's position in this Court remove any basis for the government's claim that its revisionist interpretation of Section 7 deserves judicial deference.[69] The irremediable clash between the regulations and the Secretary's brief demonstrates that the government's reading of the statute does not reflect a knowledgeable and careful reading of the Endangered Species Act, but

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[67] *Accord United States v. Wright-Barker*, 784 F.2d 161, 166 (3d Cir. 1986) (applying criminal drug law extraterritorially to conduct on high seas); *Romero-Galue*, 757 F.2d at 1152 n.13 (same); *United States v. Smith*, 680 F.2d 255, 257 (1st Cir. 1982) (same), *cert. denied*, 459 U.S. 1110 (1983). *Compare United States v. Mitchell*, 553 F.2d 996 (5th Cir. 1977). In *Mitchell*, the Fifth Circuit held that the Marine Mammal Protection Act applied to the high seas and not to foreign jurisdictions, because the statute made specific reference to the high seas and not to foreign countries. Of course, there is no similar limiting language in Section 7.

[68] The Secretary apparently believes, Br. at 6, that agency actions affecting the high seas create less potential for conflict with foreign governments than actions affecting foreign territory. This proposition is counter-intuitive—actions that affect the high seas affect each of the scores of nations that use the high seas—and, as demonstrated above, is irrelevant to the question of whether applying Section 7 to the high seas is "extraterritorial."

[69] This Court declined to defer to an agency position concerning extraterritoriality in *Aramco*, 111 S. Ct. at 1235, because, like the Secretary's here, it was neither consistent nor well-reasoned. In *Aramco*, the Court deferred instead to the agency interpretation most nearly contemporaneous with the enactment of the statute, which held that it did not apply abroad. Here, the Secretary's contemporaneous interpretation was that Section 7 *does* apply abroad, and only years later did he change that interpretation (without any claimed basis for the change in his experience applying the statute).

rather a *post hoc* rationalization for its own arbitrary conclusions.

Section 7 of the Endangered Species Act was plainly meant to prevent U.S. agency actions from contributing to the extinction of endangered species anywhere in the world. The Court should reject the Secretary's contention to the contrary.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted,

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